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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Joseph Lathus,

10 Plaintiff,

11 v.

12 County of Apache, et al.,

13 Defendants.

No. CV-24-08093-PCT-JAT

ORDER

14
15 On May 12, 2024, the original complaint was filed in this case. On May 22, 2024,
16 this Court screened that complaint under 28 U.S.C. § 1915(e)(2). (Doc. 6). The Court
17 gave Plaintiff Joseph Lathus leave to amend. (*Id.*) On June 12, 2024, Mr. Lathus filed an
18 amended complaint and other various motions, including a motion to proceed in forma
19 pauperis. The Court will screen the amended complaint. As stated in the May 22, 2024
20 Order, in 28 U.S.C. § 1915(e)(2),

21 Congress provided with respect to in forma pauperis cases that a district court
22 “shall dismiss the case at any time if the court determines” that the
23 “allegation of poverty is untrue” or that the “action or appeal” is “frivolous
24 or malicious,” “fails to state a claim on which relief may be granted,” or
25 “seeks monetary relief against a defendant who is immune from such relief.”
26 28 U.S.C. § 1915(e)(2). While much of section 1915 outlines how prisoners
27 can file proceedings in forma pauperis, section 1915(e) applies to all in forma
28 pauperis proceedings, not just those filed by prisoners. *Lopez v. Smith*, 203
F.3d 1122, 1127 (9th Cir. 2000) (“section 1915(e) applies to all in forma
pauperis complaints”). “It is also clear that section 1915(e) not only permits
but requires a district court to dismiss an in forma pauperis complaint that
fails to state a claim.” *Id.* Therefore, this court must dismiss an in forma
pauperis complaint if it fails to state a claim or if it is frivolous or malicious.
“[A] complaint, containing both factual allegations and legal conclusions, is
frivolous where it lacks an arguable basis either in law or in fact.” *Neitzke v.*

1 *Williams*, 490 U.S. 319, 325 (1989). Furthermore, “a finding of factual
 2 frivolousness is appropriate when the facts alleged rise to the level of the
 3 irrational or wholly incredible, whether or not there are judicially recognized
 4 facts available to contradict them.” *Denton v. Hernandez*, 504 U.S. 25, 33
 (1992). “A case is malicious if it was filed with the intention or desire to
 harm another.” *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005).

5 *Kennedy v. Andrews*, 2005 WL 3358205, *2-*3 (D. Ariz. 2005).

6 In his amended complaint, Mr. Lathus alleges that he was cited for obstructing a
 7 public thoroughfare. (Doc. 7). Mr. Lathus in suing 11 different Defendants over this
 8 citation, arguing that because the thoroughfare he was obstructing was a private road,
 9 pursuant to CC&Rs filed with the county, he could not be cited. Mr. Lathus is apparently
 10 being prosecuted in state court over this citation, and one of his pending motions is to
 11 remove his criminal case to federal court (and presumably consolidate it with this case,
 12 though that is unclear).

13 Generally, this Court cannot involve itself in state court criminal proceedings. *See*
 14 *Younger v. Harris*, 401 U.S. 37 (1971). Further, “the ability to remove a criminal state
 15 court action to federal court is strictly limited—a state prosecution may be removed to
 16 federal court only under the narrow circumstances set forth in 28 U.S.C. §§ 1442, 1442a,
 17 and 1443.” *United States v. Raquinio*, No. CV 23-00231 JMS-WRP, 2023 WL 3791638,
 18 at *2 (D. Haw. June 2, 2023) (footnote omitted). “Section 1442 applies to removal of
 19 certain cases by federal officers, and § 1442a applies to removal of certain cases by
 20 members of the United States armed forces.” (*Id.*). Finally,

21 Section 1443(1) authorizes removal where the defendant “is denied or
 22 cannot enforce in the courts of such State a right under any law providing for
 23 the equal civil rights of citizens of the United States, or of all persons with
 the jurisdiction thereof.” To remove a state criminal prosecution under §
 1443(1), a two-part test applies:

24 First, the petitioners must assert, as a defense to the
 25 prosecution, rights that are given to them by explicit statutory
 26 enactment protecting equal racial civil rights. Second,
 27 petitioners must assert that the state courts will not enforce that
 28 right, and that allegation must be supported by reference to a
 state statute or a constitutional provision that purports to
 command the state courts to ignore the federal rights.

Patel v. Del Taco, Inc., 446 F.3d 996, 998–99 (9th Cir. 2006) (internal

1 citation omitted).
2 (*Id.*).

3 Here, Mr. Lathus has failed to show that any of 28 U.S.C. §§ 1442, 1442a, and 1443
4 applies in this case. Accordingly, his motion to remove his criminal case to federal court
5 is denied.

6 Next, the motion to remove indicates that the criminal proceedings against Mr.
7 Lathus remain on-going in state court. All of the claims in this case relate to the state court
8 prosecution. Generally, *Heck v. Humphrey* bars civil claims that would call into question
9 the validity of a conviction unless the criminal prosecution resolved in the plaintiff's favor.
10 See e.g., *Bowman v. Diaz*, No. 1:23-CV-00524-DCN, 2024 WL 1973598, at *2 (D. Idaho
11 May 2, 2024) ("In *Heck*, the Supreme Court held that a plaintiff may not proceed with a
12 civil rights claim if a favorable result on that claim would necessarily imply the invalidity
13 of the plaintiff's criminal conviction or sentence. *Id.* at 486–87.").

14 Further, the Supreme Court has held that the cause of action for malicious
15 prosecution does not accrue until the criminal case resolves in the plaintiff's favor.
16 *McDonough v. Smith*, 588 U.S. 109, 121 (2019) ("McDonough therefore had a complete
17 and present cause of action for the loss of his liberty only once the criminal proceedings
18 against him terminated in his favor."); *Tennenbaum v. City & Cnty. of San Francisco*, No.
19 23-CV-00592-LB, 2023 WL 6541862, at *4 (N.D. Cal. Oct. 6, 2023) ("In *Heck v.*
20 *Humphrey*, the Court held that 'when a state prisoner seeks damages in a § 1983 lawsuit,
21 the district court must consider whether a judgment in favor of the plaintiff would
22 necessarily imply the invalidity of the conviction or sentence; if it would, the complaint
23 must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has
24 already been invalidated.' 512 U.S. 477, 487 (1994). A corollary is that 'a 1983 cause of
25 action attributable to an unconstitutional conviction or sentence does not accrue until the
26 conviction or sentence has been invalidated.' *Id.* at 489–99....").

27 Here, because Mr. Lathus' malicious prosecution claim, and his other claims which
28 are related thereto, would all be barred by *Heck* if he is convicted in state court, this case

1 is premature and will be dismissed without prejudice. The Court will not grant leave to
2 amend because any amendment based on these facts would be futile unless and until the
3 state criminal proceedings resolve in Mr. Lathus' favor. *See Bonin v. Calderon*, 59 F.3d
4 815, 845 (1995) (futility alone justifies denying leave to amend).

5 Alternatively, all of Plaintiff's claims can be dismissed for reasons recognized as a
6 basis for dismissal under 28 U.S.C. § 1915. Specifically, in the May 22, 2024 Order, the
7 Court explained to Mr. Lathus that Defendant Criminski is entitled to judicial immunity
8 for decisions that he made in Plaintiff's case. (Doc. 6 at 2) (quoting *Ashelman v. Pope*,
9 793 F.2d 1072, 1075 (9th Cir. 1986)). Nonetheless, Plaintiff renamed Judge Criminski as
10 a Defendant in the amended complaint. Defendant Butch Gunnels is another judge Plaintiff
11 is suing over his judicial decisions. He too is entitled to judicial immunity. Defendant
12 Kassandra Page, the Clerk of the Court, is being sued for allegedly not issuing subpoenas
13 quickly enough. She too is entitled to judicial immunity. Defendant Michael Whiting is
14 sued for being the county attorney whose office is prosecuting Plaintiff. (Doc. 7 at 1).
15 Defendant Whiting is entitled to prosecutorial immunity. *Genzler v. Longanbach*, 410 F.3d
16 630, 636 (9th Cir. 2005) ("A prosecutor is protected by absolute immunity from liability
17 for damages under § 1983 'when performing the traditional functions of an advocate'
18 [citation omitted]").) The Apache County Recorder's Office and the Apache County
19 Sheriff's office are unlikely to be jural entities that can sue and be sued—an issue Plaintiff
20 does not address. *See, e.g., Murphy v. Coconino County Sheriff's Dept.*, No. CV 08-8089-
21 PCT-DGC, 2008 U.S. Dist. Lexis 83840 (Sept. 28, 2008 D. Ariz.) (finding that a sub-part
22 of the county was not person amenable to suit under § 1983). Plaintiff sues County
23 Supervisor Nate Davis for failing to give the public in general and Plaintiff specifically
24 proper legal advice. (Doc. 7 at 7). County supervisors have no duty to give legal advice;
25 thus, this allegation fails to state a claim. Moreover, Supervisor Davis would be entitled to
26 legislative immunity for his official acts. *See Bechard v. Rappold*, 287 F.3d 827, 829 (9th
27 Cir. 2002) ("...the application of the legislative immunity doctrine to local legislators, such
28 as county commissioners, is now well-established."). The same is true for Defendant Carey

1 Dobson who Plaintiff names as a “county commissioner.” Plaintiff’s claim against county
2 engineer Ferrin Crosby is for criminal perjury, but criminal statutes do not create private
3 rights of action. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006).
4 Plaintiff fails to allege a violation of a policy, practice or custom, which is required to state
5 a claim against Apache County under *Monell*. *See Monell v. Department of Soc. Svcs.*, 436
6 U.S. 658 (1978). Finally, as to Defendant Forest Akins, Plaintiff includes factual
7 allegations regarding Mr. Akins alleged participation in cattle management in another
8 subdivision. These allegations have no relationship to Plaintiff’s criminal citation that
9 forms the basis of his claims in this case, and accordingly fails to state a claim. On this
10 record (wherein Plaintiff has already been given leave to amend), the Court finds that these
11 alternative reasons for dismissal also could not be cured by amendment.

12 Accordingly,

13 **IT IS ORDERED** that the motion to proceed in forma pauperis (Doc. 8) is granted.

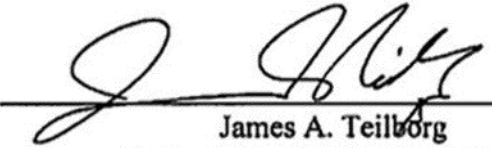
14 **IT IS FURTHER ORDERED** that the motion to remove the criminal case against
15 Mr. Lathus to federal court (Doc. 12) is denied.

16 **IT IS FURTHER ORDERED** that this case is dismissed, without prejudice, and
17 the Clerk of the Court shall enter judgment accordingly.

18 **IT IS FURTHER ORDERED** that the motions pending at Docs. 10 and 11 are
19 denied as moot.

20 Dated this 21st day of June, 2024.

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James A. Teilborg
Senior United States District Judge